

Arizona Supreme Court
Judicial Ethics Advisory Committee

OPINION 19-02

(Issued October 18, 2019)

TEACHING AT PUBLIC EDUCATIONAL INSTITUTIONS
(Withdrawing Opinion 79-02)

ISSUE

A judge has inquired about the propriety of accepting compensation for teaching a course at a state law school as an adjunct professor and asks the Judicial Ethics Advisory Committee (JEAC) to reconsider Advisory Opinion 79-02: “Treatment of Compensation for College Teaching by New Superior Court Judge.”

ANSWER

The Code of Judicial Conduct (“Code”) has changed in material respects since Opinion 79-02 was issued almost four decades ago. Additionally, some of the conclusions articulated in Opinion 79-02 are overly broad. For the reasons discussed *infra*, the JEAC withdraws Opinion 79-02. The committee concludes that although justices and judges of courts of record may not be employees of public educational institutions, they may, with certain qualifications, accept reasonable compensation for teaching in a non-employee capacity.

DISCUSSION

The JEAC is authorized to “render advisory opinions on proper judicial conduct with respect to the provisions of the Code of Judicial Conduct, any financial reporting requirements, or any other requirement of law applicable to judges.” Rule 82(b)(1), Rules of the Supreme Court. The pending inquiry requires the committee to consider both the Code and the Arizona Constitution – specifically, the following constitutional provision:

Justices and judges of courts of record shall not be eligible for any other public office or for any other public employment during their term of office, except that they may assume another judicial office, and upon qualifying therefor, the office formerly held shall become vacant.

Ariz. Const., art. 6, sec. 28.

Opinion 79-02 relied on the constitutional prohibition against “other public employment” during a judge’s term of office. As pertinent here, the opinion identified and answered the following question:

1. May a superior court judge receive compensation for teaching a course in philosophy at a city college or a law course at a criminal justice center?

Answer: No.

Opinion 79-02 assumed the inquiring judge would be “regarded as an employee” of the educational institutions – a status that would clearly violate article 6, section 28 of the state constitution. But language in Opinion 79-02 extends beyond the employer-employee context. For example, the opinion prohibits a judge from accepting a “governmental salary,” or “other regularly paid compensation.” The opinion also states that judges may accept an honorarium (or its “intended equivalent”) *only* for “guest lecturing on an isolated or irregular basis” – a conclusion that presumably would preclude a judge from accepting compensation for regularly teaching a course over a period of weeks or months in a non-employee capacity.

We agree that supreme court justices and judges serving on courts of record are constitutionally prohibited from holding “employment” with public educational institutions. We disagree, though, with the unqualified statement in Opinion 79-02 that teaching “at a publicly funded college or university is public employment.”

It is beyond the JEAC’s jurisdiction to define precisely when a teaching judge becomes an employee of a public educational institution and when he or she holds some other status. See, e.g., Bruntz, John, “*The Employee/Independent Contractor Dichotomy: A Rose is Not Always a Rose*,” Hofstra Labor and Employment Law Journal, vol. 8, issue 2 (1991). The Arizona Constitution prohibits the former but not the latter. A judge must perform due diligence and make this threshold determination before accepting compensation for teaching at a public educational institution. Such an assessment should include, at a minimum, any published criteria and determinations by the educational institution about the status of the teaching position. See, e.g., https://sst.asu.edu/sites/default/files/financial-independent_contractor_chklist.pdf (last visited October 11, 2019).

Since the issuance of Opinion 79-02, the JEAC has had occasion to more fully analyze and interpret article 6, section 28. In Opinion 99-04, we considered whether a superior court judge could accept compensation for officiating at public high school sporting events. The committee answered that question in the affirmative because the

judge was not considered an employee of the high schools or the organization that administered the athletic events:

The Arizona Interscholastic Association (“AIA”) administers high school athletics in Arizona. Football officials receive game assignments from the AIA. Both the AIA and the participating schools treat football officials strictly as independent contractors, not employees. Officials are free to accept or reject a proposed assignment and take no direction from school administrators, athletic directors, coaches, faculty, or other personnel as to how they perform their duties. The officials sign no contracts with any school. They provide their own health, accident, and liability insurance, and pay their own taxes.

The factors cited in Opinion 99-04 are similarly relevant to a determination of whether a judge teaching at a public educational institution is an employee. And we agree with the unstated underpinning of Opinion 99-04: that the term “employment,” as used in the state constitution, is a term of art that does not encompass every extra-judicial activity that results in some form of compensation by a public entity. *See* Rule 3.12 (judges may accept reasonable compensation and honoraria for teaching activities permissible under the Code and other law unless such acceptance “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”).

One final aspect of Opinion 79-02 bears mention. That opinion concludes that judges cannot be compensated for teaching activities that occur “during normal court hours.” But as the JEAC recently observed in Opinion 18-05 (“Judge Pro Tempore Service by Judicial Employees and by Full-Time Justices of the Peace”), the propriety of accepting compensation for extrajudicial activities conducted during court business hours is not squarely addressed by the Code. Other than Rule 3.16(D), which prohibits judges from accepting fees, honoraria, or gratuities for performing wedding ceremonies during court hours, the Code is silent regarding compensation for extrajudicial activities that occur during hours for which a judge is being compensated by his or her court.¹ What is clear from the Code is that judicial duties must “take precedence over all of a judge’s other activities,” Rule 2.1, including teaching. Judges must be available to hear and decide assigned matters, Rule 2.7, must “devote adequate time to judicial duties, [and] be punctual in attending court and expeditious in determining matters under submission,”

¹ As Opinion 18-05 notes, the Arizona Attorney General “may be a resource for guidance on this issue.” *See* <https://www.azag.gov/opinions> (last visited July 15, 2019) (stating that AG opinions are available to any public officer of the state on questions of law relating to their office).

Rule 2.5 cmt. 3, and must perform their judicial duties “competently, diligently, and promptly,” Rule 2.5(A). But “[t]o the extent that time permits, and judicial independence and impartiality are not compromised,” the Code encourages judges to engage in appropriate extrajudicial activities and emphasizes that judges are “uniquely qualified” to pursue law-related activities, “such as by speaking, writing, teaching, or participating in scholarly research projects.” Rule 3.1, cmt 1; *see also* Rule 3.1, cmt 2 (“Participation in both law-related and other extrajudicial activities helps integrate judges into their communities and furthers public understanding of and respect for courts and the judicial system.”).

CONCLUSION

For the foregoing reasons, the JEAC concludes that a justice or judge of a court of record may not receive compensation for teaching as an employee of a public educational institution. But with the qualifications discussed *supra*, they may accept reasonable compensation for teaching in some other capacity.

Opinion 79-02 is hereby withdrawn.